KOPERASI USAHA BERSATU (M) BHD.

v.

LEMBAGA KEMAJUAN JOHOR TENGGARA

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. S7-22-653 OF 1989]
31 MAY 1990

CIVIL PROCEDURE: *Interlocutory - Unsurveyed land - Inability to identify - Serious question to be tried - Bona fides - Not frivolous or vexatious - Balance of convenience - Justice between the parties - National Land Code 1965, s. 79(1).*

CIVIL PROCEDURE: *Issue of inability to identify land not part of defendant's pleadings - Raised later - Rejected.*

On 5 August 1987 the defendant D agreed to lease the said land for 99 years to the plaintiff P, the total rent to be RM1,570,800. The initial payment of RM100,000 was made on 26 September 1988, the balance was payable by 20 March 1989. P however was granted an extension until 31 March. Since 31 March 1989 was a non-working day in Johor, payment was allowed to be made on 1 April 1989 - this was done. D sent a letter confirming receipt of the cheque for RM1,470,800.

However, this cheque was returned to P on 22 March 1989 on the basis that since P had failed to pay before 22 March 1989, the late payment was unacceptable; the RM100,000 was duly refunded. P seeks an injunction to restrain D from dealing with the said land. By way of affidavit, D's Land and Local Government Manager, M said that he had advised P's representative that since 20 March 1989 was the final date for payment, any payment after this date would only be accepted as consideration of the proposed lease agreement upon obtaining prior consent and approval of D's management. In addition, D had decided to lease the said lands to a third party.

It was also contended, in two affidavits filed 4 months later, that the land was unsurveyed and until such time a survey is conducted, the said land is not sufficiently identified and ascertained. There was an unsurveyed plan annexed to the initial letter of offer of 5 August 1987.

Held:

[1] The inability to identify the said land is not part of the defendant's pleadings, neither was this issue brought out in the first affidavit in reply affirmed by M on 8 September 1989. The issue was only seriously raised in January 1990, some four months later and the defendant should not be allowed to raise this issue particularly when it was not even mentioned in their statement of defence.

[2] The *bona fides* of the defendant is questionable as they entered into the lease agreement based on the plan submitted by them which had sufficiently (at least for contractual purpose) delineated the said land. It was the defendant who issued the letter of offer, the terms of which were dictated by them and it was they who compiled the plan showing the location the approximate size and boundary. In the circumstances the rule of *contra proferentum* must apply to them.

[3] It is simply ridiculous for the defendant to say that the said plan is insufficient to identify the said land when the Counsel for the defendant informed this Court that they would be using the same plan to enter into another lease agreement with a third party.

[4] (a) The defendant can easily engage a qualified surveyor to survey the lands located in the region to identify the boundary of the lands that do not fall within the 4,200 acres located at the southern part of the region which have been leased to the plaintiff.

(b) In alienating land the State Authority could do so pending the actual survey of the alienated land provided there is a plan which gives a description sufficient to enable the land and its boundaries to be provisionally identified and ascertained - s. 79 of the National Land Code.

[5] (a) The question of whether the plan annexed to the letter of offer dated 5 August 1987 is sufficient to identify the disputed land cannot be answered at this stage. It is a serious question to be tried. The claim of the plaintiff is therefore not frivolous or vexatious.

(b) The plaintiff could not be fully compensated with monetary damages. The balance of convenience therefore lies in favour of the plaintiff.

[6] From the affidavit evidence it appears at this stage that time is no longer the essence of the lease agreement and the plaintiff was allowed to or at least made to understand that they could pay the balance sum on 1 April 1989 (about 10 days later) by an authorised agent of the defendant namely M; in addition it is important to note that there is no evidence that the management division of the defendant had rejected the late payment.

[Interlocutory injunction allowed.]

Cases referred to:
Syarikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority [1971] 2 MLJ 27
American Cyanamid v. Ethican Ltd. [1975] 2 WLR 316

Legislation referred to:
National Land Code 1965, ss. 77(2), 79(1)

For the plaintiff - M. Indrani; M/s. Yeoh Poh San & Company
For the defendant - Md. Ali Zaitun; M/s. Ali Zaitun & Sallehrahman Tendot

JUDGMENT

Lim Beng Choon J:

The plaintiff in this case instituted an action against the defendant on 14 August 1989 claiming damages and seeking an injunction to restrain the defendant from disposing, transferring or dealing or whatsoever of 4,200 acres of land in the mukim of Sungei Yong/ Bukit Jelati in the District of Kluang Johor. After filing their writ with the statement of claim, the plaintiff on the same day filed an *ex parte* summons seeking for an interlocutory injunction to restrain the defendant whether by themselves or by their servants or agents or otherwise from disposing, transferring or dealings or whatsoever of the said 4,200 acres of lands, I refused to grant the plaintiff an *ex parte* hearing and directed that the said summons be served on the defendant. After service of the said summons, hearing of the plaintiff's application was postponed three times to enable Counsel to get instructions from the parties concerned and to file the necessary affidavits. The matter finally came on for hearing on 19 February 1990 and after hearing the submissions of the Counsel for the respective parties I

granted the interlocutory injunction sought by the plaintiff subject to their payment of the full agreed rental of the lease in respect of the said land to the defendant's solicitors as stakeholder. I also directed the plaintiff to give the usual undertaking regarding damages.

I shall now give my reasons for granting the interlocutory injunction.

The case for the plaintiff can be briefly stated as follows:

By letter dated 5 August 1987 the defendant agreed to lease about 4,200 acres of land in the mukim of Sungei Yong/Bukit Jelati, District of Kluang ('the said land') for a period of 99 years to the plaintiff. It was agreed that the total rental of the said land was RM1,570,800. Part payment of the rental sum of RM100,000 shall be paid before the execution of the lease agreement whereby the balance should be paid upon the execution of the lease agreement. On 26 September 1988 the plaintiff made the initial part payment of RM100,000 to the defendant. The balance sum of RM1,470,800 should be paid by the plaintiff to the defendant on or before 20 March 1989. On 22 March 1989, the plaintiff was granted an appointment with the defendant wherein the project manager of the plaintiff and two others met one Encik Punijan, the Pengurus Tanah dan Kerajaan Tempatan of the defendant. The representatives of the plaintiff explained to Encik Punijan the reasons as to why the plaintiff were unable to meet the deadline of 20 March 1989 following which Encik Punijan agreed to allow the plaintiff until the end of March to pay the balance of RM1,470,800 and the parties thereby consented to the same. On 30 March 1989 by a telephone conversation with Encik Punijan the project manager of the plaintiff brought to Encik Punijan's attention that 31 March 1989 happened to fall on a Friday which is not a working day in Johor wherein Encik Punijan told the said project manager that the payment of the balance sum could be made on Saturday 1 April 1989. Payment was promptly made on 1 April 1989 and the defendant accepted the same. In acknowledging payment of the balance sum the defendant:

Pengurus Besar Kumpulan
Koperasi Usaha Bersatu Malaysia Bhd.
Tingkat 2, Bangunan UMNO
Jalan Tuanku Abdul Rahman
Peti Surat 12294
50772 Kuala Lumpur.

Tuan

Permohonan Tanah Seluas 4,200 Ekar Di Kawasan Sungai Yong/Bukit Jelati

Berhubung dengan surat tuan bil LKK/LAND bertarikh 30 Mac 1989 adalah dimaklumkan bahawa pihak Kejora telah menerima cek Bank of Commerce Bhd No.8622305 bernilai $1,470,800 untuk bayaran pajakan tanah. Resit rasmi Kejora akan dihantarkan kemudian.

Sekian, terima kasih.

"Bersih, Cekap dan Amanah"

Dengan hormatnya

(Sgnd).

(Salim bin Md. Osman)
Penolong Pengurus Tanah
Bahagian Tanah dan Kerajaan Tempatan
b.p. Pengurus Besar.

The defendant however through Encik Punijan returned the cheque for the balance sum to the plaintiff on 5 April 1989 stating that as the plaintiff had failed to pay the said sum on or before 22 March 1989 the late payment made by them could not be accepted. The plaintiff was also told that the initial part payment of RM100,000 would be duly refunded to then. On 26 April 1989 the said refund of the RM100,000 was duly made. Under the circumstances the plaintiff therefore contended that the defendant was estopped from retracting from the agreement to lease the said land to the plaintiff.

From the statement of defence and the affidavit in reply affirmed by Encik Punijan (full name is Punijan bin Sutarjo) on 18 September 1989 the case for the defendant can briefly be stated as follows:

The defendant admitted that they had granted a lease of the said land to the plaintiff by letter dated 5 August 1987. They also admitted that the total rental of the said land was RM1,570,800 and that part payment of the rental in the sum of RM100,000 should be made prior to the execution of the lease agreement which the plaintiff did make the payment on 26 September 1988. Although the payment of the balance sum should be made on or before early January 1988 the plaintiff failed to do so and the defendant through their Penolong Pengurus Tanah Kanan wrote to the plaintiff's project manager on 20 March 1988 to enquire when would the plaintiff be able to pay the balance sum. The defendant also wanted to know about the draft agreement to charge the land in question (memberikan maklumkan balas mengenai deraf Perjanjian Pajakan Tanah berkenaan). Despite the failure on the part of the plaintiff to make payment of the balance sum the defendant was prepared to give them several extensions of time to make the payment. On 9 February 1989 the plaintiff sent a telex to the defendant asking for a further extension until 20 March 1989 to make the payment. In response to the plaintiff's request the defendant sent the following letter dated 21 February 1989 to the plaintiff:

> Tuan,
>
> **Permohonan Tanah Seluas 4,200 Ekar Di Kawasan Sungai Yong/Bukit Jelati**
>
> Berhubung dengan perkara diatas, Telex tuan bertarikh 9 Februari 1989 adalah dirujuk.
>
> 2. Dimaklumkan bahawa rayuan tuan untuk menangguhkan tempoh bayaran premium sehingga 20 Mac 1989 adalah dipersetujui. Diharapkan dapat pihak tuan mematuhi persetujuan tersebut supaya tindakan-tindakan selanjutnya dapat diambil dengan segera.
>
> Sekian, terima kasih.
>
> "Bersih, Cekap dan Amanah"
>
> Dengan hormatnya,
>
> (Punijan bin Sutarjo)
> Pengurus Tanah dan Kerajaan Tempatan
> Bahagian Tanah dan Kerajaan Tempatan
> b.p. Pengurus Besar.

Encik Punijan, however, admitted that a meeting was held on 22 March 1989 and attended by the representatives of the plaintiff and himself as representative of the defendant. At the meeting he told the plaintiff's representatives that since 20 March 1989 was the final date allowed by the defendant for the plaintiff to make the payment any payment made by them to the defendant after that date would only be accepted as a consideration of the proposed agreement for the lease upon obtaining prior consent and approval from the management side of the defendant. Even on 30 March 1989, so said Encik Punijan, through the telephone

conversation he again pointed out that the balance sum would only be accepted with the consent and approval of the management, side of the defendant. Encik Punijan went on to say that the letter acknowledging receipt of the payment of the balance sum was no more than a mere confirmation that the cheque for RM1,470,800 had been handed to the defendant but upon accepting the cheque he again told the plaintiff's representatives of the need to obtain the approval and consent of the management side before the official receipt could be sent to the plaintiff. It was further averred that the board of directors of the defendant had decided at the meeting of 27 April 1989 to lease the 4,100 acres land in the Mukim of Kluang/ Kahang to a third party for the cultivation of oil palm, cocoa and fruits. The defendant therefore urged this Court not to grant the interlocutory injunction sought by the plaintiff since they would lose substantial rental income of the lease as there were not many companies that were capable and ready to take up the lease for the cultivation of the said land.

Subsequently Encik Punijan filed two further affidavits in reply. In the further affidavit on 4 October 1988, he averred that:

> The area known as 'Kawasan Sungai Yong/Bukit Jelati' forms part of 'Kawasan Johor Tenggara and is situated partly in the mukim of Kahang, Johor and has a total area of approximately 9,000 acres.
>
> At the present moment the title to the lands in the area known as Kawasan Sungai Yong/ Bukit Jelati has not been registered and issued to the defendant even though the State Authority has agreed in principle to alienate it to the defendant.

In the second further affidavit affirmed on 17 January 1990, Encik Punijan averred that for the purposes of negotiations between the parties, both parties relied on the unsurveyed plan annexed to the letter of offer dated 5 August 1987. That being so and until such time a survey is conducted the said land is not sufficiently identified and ascertained.

In support of Encik Punijan's assertions, one Mahabob Khalid a licensed land surveyor, filed in an affidavit affirmed by him on 17 January 1990. He averred in his affidavit that the plan used by the parties was only capable of showing the approximate location of the land in question and also the approximate size of the land as 8,700 acres. The horizontal protected line of 86 degrees 45 minutes and 00 second at the centre of the plan was also based on scaled values to which the southern portion was said to give an approximate area of 4,200 acres.

To rebut the defendant's contention that the said land was unidentifiable the plaintiff engaged one Elvis Fernandez a registered valuer who affirmed an affidavit on 10 November 1989. Annexed to his affidavit is a Valuation Report. He confirmed that the Valuation Report formulated by him was based on the plan annexed to the defendant's letter of offer of 5 August 1987. He also said that he found the plan adequate for locating the lands and inspecting the same for valuation purpose.

In his submission, Counsel for the defendant contended firstly that the defendant owned approximately 8,700 acres in the region of Sungai Yong/Bukit Jelati where the said land was located. He pointed out to this Court that the plaintiff was only claiming for some 4,200 acres of the land located at the southern end of the region. As the licensed surveyor had stated in his affidavit that unless the lands in that region had been surveyed and the surveyed plan verified, the 4,200 acres land in dispute could only be approximately identified in terms of its size and boundary. He therefore argued that an injunction restraining the defendant from dealing with the 4,200 acres land in dispute was as good as giving an

injunction restraining the defendant from dealing with the 8,700 acres of land located in that region. Counsel, however, conceded that the defendant is now entering into a lease agreement with a third party based on the same plan annexed to the letter of offer of 5 August 1987 by which the defendant agreed to lease the said land to the plaintiff. Secondly Counsel argued, with very much less vigour, that in accepting the balance sum of RM1,470,800, it had been made clear to the plaintiff that the acceptance was made without prejudice to the defendant's right to reject the said payment should the Executive and Management Board refuse to give their approval and consent to accept the payment out of the stipulated date i.e. 20 March 1989. On the other hand Counsel for the plaintiff in her submission argued (if I understood her correctly) that the said land could be sufficiently identified by the plan annexed to the letter of offer of 5 August 1987. In support of her contention she cited s. 79(1) of the National Land Code which says:

> where any approval of the State Authority to the alienation of land under this Act relates to land which (under subs. (2) of s. 77) is required to be surveyed before it can be held under final title, it shall be given by reference to a plan and description sufficient to enable the land and its boundaries to be provisionally identified and ascertained pending the survey.

and said that until a proper survey had been carried out 'everything is provisional'. She also said that the defendant's contention was not where the said land was located but rather the size and boundary could not be exactly identified. I take it that what she meant is that the location, approximate size and boundary could be easily identified from the plan annexed to the defendant's letter of offer of 5 August 1987.

In my consideration of the present case the first point which I must take into account is that the inability to identify the said land is not part of the defendant's pleadings. Neither was this issue brought out in the first affidavit in reply affirmed by Encik Punijan on 8 September 1989. The issue was only seriously raised in January 1990, some four months later. That being the case I am inclined to hold that the defendant should not be allowed to raise this issue particularly when it was not even mentioned in their statement of defence. On this ground alone I am of the view that their objection should be ignored.

Even if I am wrong in arriving at the aforesaid conclusion I think I am entitled to question the *bona fides* of the defendant. They entered into the lease agreement based on the plan submitted by them which had sufficiently (at least for contractual purpose) delineated the said land. They had led the plaintiff to believe that the land as shown in the said plan was the one to be leased to the plaintiff and as a consequence of which the plaintiff had paid the initial part payment of RM100,000. It was the defendant who issued the letter of offer, the terms of which were dictated by them. It was they who compiled the plan showing the location the approximate size and boundary. Surely in the circumstances the rule of *contra proferentum* must apply to then - see *Syarikat Lee Keng Sdn. Bhd. v. Port Swettenham Authority* [1971] 2 MLJ 27 at 30. It is simply ridiculous for the defendant to say that the said plan is insufficient to identify the said land when the Counsel for the defendant informed this Court that they would be using the same plan to enter into another lease agreement with a third party. The argument of the learned Counsel that to place an injunction over the said land would amount to placing an injunction over the 8,700 acres of land located at the region is best mentioned and be rejected for the simple reason that the defendant can easily engage a qualified surveyor to survey the lands located in the region to identify the boundary of the lands that do not fall within the 4,200 acres located at the southern part of the region which have been leased to the plaintiff. In any case even in alienating land the State Authority could do so pending the actual survey of the alienated land provided there is a plan which

gives a description sufficient to enable the land and its boundaries to be **provisionally** identified and ascertained - s. 79 of the National Land Code. In my scrutiny of the affidavit evidence brought in by the parties I am more than satisfied that the question of whether the plan annexed to the letter of offer dated 5 August 1987 is sufficient to identify the disputed land cannot be answered at this stage. It is a serious question to be tried. The claim of the plaintiff is therefore not frivolous or vexatious - see *American Cyanamid v. Ethican Ltd.* [1975] 2 WLR 316. Furthermore I am also fully satisfied that the plaintiff could not be fully compensated with monetary damages. The balance of convenience therefore lies in favour of the plaintiff.

With regard to the second contention of the defendant namely that the outstanding sum of the rental amounting to RM1,470,800 was not paid by the plaintiff within the stipulated date of 20 March 1989. I am again convinced that as there is conflicting evidence as to this matter it is not the function of this Court to try to resolve the matter at this stage of the proceeding (see *American Cyanamid* case at p. 323). The matter can only be resolved at the trial particularly when in acknowledging receipt of the damage for RM1,470,800 no, mention was made that the receipt of the same was subject to the approval and consent of the managing division of the defendant. In any case from the affidavit evidence it appears to me at this stage that time is no longer the essence of the lease agreement and the plaintiff was allowed to or at least made to understand that they could pay the balance sum on 1 April 1989 (about 10 days later) by an authorised agent of the defendant namely their Pengurus Tanah dan Kerajaan Tempatan. One important point to note is that there is no evidence that the management division of the defendant had rejected the late payment. All we have is the rejection by the said Pengurus and the Penolong Pengurus.

In the circumstances of this case it is manifestly clear that in order to do justice to the case at this threshold stage the interlocutory injunction must be allowed to remain on the terms mentioned earlier.

Also found at [1991] 1 CLJ 543